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December 13, 2007

### **BY E-FILE**

The Honorable Joseph J. Farnan, Jr.  
United States District Court, District of Delaware  
844 North King Street  
Wilmington, DE 19801

Re: *NICE Systems, Inc. and NICE Systems, Ltd. v. Witness Systems, Inc.*  
C.A. No. 06-311 (JJF)

Dear Judge Farnan:

We write in response to the letter to the Court from William J. Marsden Jr., Esq. dated December 12, 2007.

### **Narrowing of the Case for Trial**

As we informed the Court yesterday, NICE further narrowed its case to 15 claims and 6 patents. NICE has informed Witness this morning that it has further limited the claims it will assert to 13 claims. As set forth more fully in my letter dated December 12, 2007 to the Court, Witness' overly broad invalidity contentions and excessive number of prior art references prevents NICE from narrowing its case further without prejudice.

With regard to the number of products at issue in the case, NICE disagrees with Witness that there are 76 accused products. NICE has only accused 5 core recording products sold by Witness of infringement. As Witness made clear to the Court in its briefing in support of its transfer motion on June 29, 2006 (*see* D.I. 15), the five core recording products are Contactstore, Contactstore for IP, Balance, Contactstore for Communications Manager and Quality for Communications Manager. From the standpoint of the asserted claims, each of these

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core products share the same or very similar components and technology with the only difference being its branding. Thus, the number of accused products are a realistic number for presentation to a jury.

**Schedule for Expert Reports**

Witness argues that it should have more time to respond to NICE's infringement report because it "must complete two reports (invalidity and noninfringement) during its time period." Witness' argument is flawed in several respects.

First, Witness has had several months to prepare its invalidity expert report. Most telling is that Witness has very recently filed reexamination requests for all of the patents-in-suit which presumably present its best invalidity arguments to the Patent and Trademark Office on every claim of the patents-in-suit.<sup>1</sup> Therefore, Witness does not need time to complete its invalidity report.

Second, Witness has two infringement experts which according to Witness' counsel will each be working on the infringement issues related to three patents-in-suit. Thus, each of Witness' experts will only be writing reports on half of the infringement issues in the case. NICE, on the other hand, has one expert to address all of Witness' invalidity positions on all of the patents-in-suit.

In sum, there is no justification for Witness to have more time to respond to NICE's infringement expert report than NICE has to respond to Witness' invalidity report.

**Schedule for Expert Depositions**

According to Witness' counsel, its three expert witnesses are available for deposition only after January 7, 2007, the date the parties will file their proposed pretrial order with the Court. Given that the Court has scheduled the pretrial conference on January 9, 2007, NICE believes that expert depositions should be completed on or before January 7, 2007. Given that the January 14, 2008 trial and related obligations have been set for over a year, NICE's experts are prepared to shorten and/or cancel planned travel with family and work around other important personal matters to be available to complete expert discovery on or before January 7, 2007. Witness not only purports that *all* of its experts are not available prior to January 7, 2007 for deposition due to holiday travel but that two of the expert depositions must take place in *San Francisco and Indiana* when the parties' counsel should be in Delaware focused on preparing for trial. NICE believes that all of the experts in the case should make themselves available to complete expert discovery on or before January 7, 2007 and in more convenient locations.

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<sup>1</sup> NICE recently learned that Witness filed all of these reexamination requests within the past several weeks. Witness has not provided NICE's litigation counsel with copies of the reexamination requests.

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Counsel is available should the Court have any questions.

Respectfully,

*Melanie K. Sharp* (MKS #4764)

Melanie K. Sharp (No. 2501)

MKS:mts

cc: Monté T. Squire, Esq.  
Scott Lindvall, Esq.  
Clerk of the Court (by Hand Delivery)  
William J. Marsden Jr., Esquire (by Email)